

SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

IBLA 98-144, 98-168, 98-207

Decided May 20, 1998

Separate appeals from decisions of the Utah State Office, Bureau of Land Management, rejecting appeals from approval of an application for permit to drill and removal of a visual resource stipulation from a Federal oil and gas lease. SDR UT 98-3; UTU-75058.

Decisions in IBLA 98-144 and 98-207 affirmed; appeal in IBLA 98-168 dismissed; petitions for stay denied as moot.

1. Appeals: Generally--Appeals: Jurisdiction--Oil and Gas Leases: Drilling

A decision approving an application for a permit to drill an oil and gas well under 43 C.F.R. § 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 C.F.R. § 3165.3(b). Where an individual fails to exercise his right to seek State Director review, he may not appeal a subsequent decision of the State Director, issued to a third-party, affirming the action taken by the authorized officer.

2. Administrative Practice--Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: Land-Use Planning--Oil and Gas Leases: Stipulations

Where, as a result of a resource management planning process, resource allocation decisions are made which will result in impacts inconsistent with the visual resource inventory classification assigned to a parcel of land, that classification should be changed to reflect the visual resource management classification appropriate to the resource allocation decision.

3. Administrative Practice--Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: Land Use Planning--Oil and Gas Leases: Stipulations

Where an analysis of an RMP indicates that the resource allocation decisions are inconsistent with the visual

resource management classification assigned to the parcel of land, and the record further indicates that the visual classification was assigned in error, the Board will affirm the implementation of the resource allocation decision.

4. Administrative Practice--Environmental Quality:
Generally--Federal Land Policy and Management Act
of 1976: Land-Use Planning

Where the factual predicates upon which a decision involving resource allocation in a resource management plan was based cease to exist, the proper course of action is to amend or revise the resource management plan to reflect the new realities.

5. National Environmental Policy Act of 1969:
Environmental Statements--Oil and Gas Leases: Generally

A finding that an application for a permit to drill will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, and W. Herbert McHarg, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; Kimberly A. Tempel, Esq., and Constance E. Brooks, Esq., Denver, Colorado, for Legacy Energy Corporation; Craig C. Halls, Esq., San Juan County Attorney, Monticello, Utah, for the San Juan County Commission; Elaine England, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southern Utah Wilderness Alliance (SUWA) has appealed from a decision of the Utah Deputy State Director, Bureau of Land Management (BLM or Bureau), issued on January 16, 1998, affirming a December 5, 1997, decision of the San Juan Resource Area (SJRA) Manager which had approved an application for permit to drill (APD), filed by Legacy Energy Corporation (Legacy). This appeal has been docketed as IBLA 98-144. The San Juan County Commission (the County) has also filed an appeal from the Deputy State Director's decision. That appeal is docketed as IBLA 98-168. Finally, SUWA has separately challenged the February 5, 1998, letter from the Associate State Director rejecting its protest to the Notice issued on December 9, 1997, that BLM was removing a special stipulation relating to

visual resource management standards from Federal oil and gas lease UTU-75058 on the grounds that it had been improperly attached to that lease. This appeal is docketed as IBLA 98-207.

Together with its notices of appeal, SUWA has requested that the Board issue a stay pursuant to 43 C.F.R. § 3165.4(c) with respect to both IBLA 98-144 and IBLA 98-207. Additionally, Legacy has filed a motion for leave to appear as amicus curiae in IBLA 98-144. Finally, the County has filed a request for an extension of time in which to submit a statement of reasons in IBLA 98-168, and, subsequently, a statement of reasons for appeal. For the reasons provided below, we hereby recognize Legacy as an amicus curiae in these proceedings, dismiss the appeal of the County, affirm the decisions of the Utah State Office in denying the appeals submitted by SUWA, and deny the request for a stay on the grounds of mootness.

A detailed knowledge of the factual background in which these appeals arise is a predicate for understanding our actions herein. The approved APD, under challenge herein, authorized, subject to various conditions, the drilling of the Lockhart Federal No. 1 well on a site located in sec. 5, T. 29 S., R. 21 E., Salt Lake Meridian, Utah, within noncompetitive Federal oil and gas lease UTU-75058. This lease had issued effective April 1, 1996, and had been committed to the Lockhart Canyon Unit on March 6, 1997. Together with the standard lease stipulations, the lease was impressed with a special Visual Resource Management (VRM) stipulation advising that "[t]he area has high quality visual resources," and notifying the lessee that "[e]xploration, drilling, and other development or production activities must meet the objectives of VRM Class II."

Legacy submitted its APD on March 31, 1997, designating a drilling location in the SW¹/₄NE¹/₄ sec. 5, with an estimated drilling depth of 5,400 feet. Pursuant to this request, SJRA conducted an environmental assessment (EA). See EA UT-069-96-029, dated June 16, 1997. As a result of concerns raised in the development of the EA, various conditions of approval (COA's) were attached to the APD, and Legacy agreed to relocate the well site within sec. 5 to minimize impacts on the desert bighorn sheep. See Decision Record/Finding of No Significant Impact, dated August 26, 1997 (DR/FONSI I).

Of particular note were the concerns raised with respect to possible impacts of the proposed action on desert bighorn sheep as well as the effects the proposal might have on visual resources, particularly as viewed from various vantage points within nearby Canyonlands National Park.

In response to the concerns related to impacts on desert bighorn sheep, COA No. B-3 provided:

All initial construction activity and well drilling operations shall be prohibited from April 1 to August 31 and October 15 to December 31 to avoid desert bighorn sheep lambing and rutting periods and the dry summer months when the Lockhart

Basin sheep herd is dependent upon the permanent spring as a source of drinking water. [1/]

In addition, COA No. B-8 required the installation of a gate and fence across the access road to prevent recreational vehicular access along the road to the well site. The only COA which dealt with effects on visual resources required that all production facilities be painted brown. See COA No. B-9.

The APD, with the COA's delineated in DR/FONSI I, was formally approved on August 27, 1997. However, approval of the APD was subsequently challenged by SUWA and the County, both of whom sought State Director review (SDR). Though each of these entities focussed their challenge on COA No. B-3, they proceeded from opposite perspectives. Thus, SUWA contended that COA No. B-3 provided inadequate protection to the desert bighorn sheep, while the County assailed BLM for the drilling restrictions which it had imposed on Legacy, arguing that they exceeded the limitations allowed under 43 C.F.R. § 3101.1-2. 2/

By decision dated October 24, 1997, the Deputy State Director set aside the approval of the APD and remanded the DR/FONSI to the SJRA for

1/ We note that the DR/FONSI I rejected a further proposal to require that all workover activities and transportation of crude oil and produced waters be prohibited during lambing and rutting periods based on the conclusion in the EA that "these activities would be less impacting on desert bighorn sheep than initial drilling operations because they would be repetitious and predictable" and "[s]tudies show that desert bighorn sheep will habituate to human activity if the activity is predictable and non-threatening." (DR/FONSI I at 2.)

2/ This regulation provides that a lessee has the right to use so much of the leased lands as are necessary to the exploration for and extraction of the leased resource, subject to stipulations in the lease and "such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." Id. The regulation recognizes that such measures must be consistent with the lease rights granted but notes:

"At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year."

Id. This last provision is referred to by the County as the "200 meter/60-day" rule.

further analysis and consideration. See SDR UT 97-11. In this decision, the Deputy State Director noted that the lease contained no special stipulation respecting the desert bighorn sheep and that the SJRA Resource Management Plan (RMP), which had authorized the issuance of leases for the area without protective stipulations, had not been amended by the subsequent Desert Bighorn Sheep Management Plan. From this, the Deputy State Director concluded that "[b]y issuing the lease, BLM accepted the possibility of impacts to the sheep," only subject to such reasonable measures as BLM might impose under 43 C.F.R. § 3101.1-2 to minimize adverse impacts to other resource values. (Decision at 2.)

The Deputy State Director noted that, under current BLM policy, restrictions to "existing" leases in excess of that delineated in the regulations (see note 2, *supra*) could only be imposed upon a finding that they were necessary to prevent unnecessary and undue degradation of public lands and their resources. While the SJRA Manager had, in fact, indicated that BLM's decision to relocate the well site within sec. 5 and to impose limitations on the periods in which drilling would be allowed were necessary in order to avoid unnecessary and undue degradation of the public lands, the Deputy State Director complained that "complete analysis supporting that decision is not included in the EA." *Id.*

The Deputy State Director was equally critical of the EA's discussion of alternative drilling sites and production methods. *Id.* at 3. Based on the foregoing, the Deputy State Director directed the SJRA Manager to "revisit the analysis presented in the EA in conjunction with the requirements of" current BLM policy and to supplement the analysis of alternative well sites and production methods.

In conformity with the Deputy State Director's decision, the SJRA subsequently expanded its environmental analysis, particularly with respect to the impacts on desert bighorn sheep which could be reasonably expected to occur as the result of Legacy's APD. See EA UT-069-97-029, dated Dec. 5, 1997. Because of the importance of this issue in the matter of a stay, we will set forth the EA's analysis in some detail.

Initially, the EA described the existing environment as it related to desert bighorn sheep. In doing so, it provided a historical framework which illuminates many of the problems which these appeals present:

The Lockhart Basin area was not identified as, or included within, "Seasonal Wildlife Protection Areas" as a "Bighorn Lambing And Rutting Area" for the protection of crucial desert bighorn sheep habitats and the continued existence of bighorn populations. At the time the San Juan RMP was approved, the SJRA did not have the information subsequently gained from UDWR [Utah Division of Wildlife Resources] radio telemetry data and, additional desert bighorn sheep observations within the

Lockhart Basin area. The bulk of this data was collected after the San Juan RMP was approved. In effect, this constitutes a special circumstance since data collected after the approval of the San Juan RMP have found that the dynamics of this bighorn population are changing. The population is increasing, and the existence of a key spring which is fundamental to the continued existence of this bighorn population has been verified.

The Lockhart Basin desert bighorn sheep herd is contiguous with the Needles (Canyonlands National Park) and North San Juan herds. These three bighorn herds could be considered a single population because there are no geographic barriers to prevent movement and gene flow between the three units. At one time, the North San Juan bighorn herd was the largest in Utah and the source from which many transplants were made. However, this bighorn herd declined drastically in the mid 1980's due to a disease problem. By 1989, only 8 bighorn were counted on the aerial survey of this unit. The unit still remains at low population numbers.

Little was known about the Lockhart Basin bighorn population, and biologists assumed that they had met the same fate as that of the North San Juan population. Because of this assumption, the San Juan RMP left the Lockhart Basin area open to oil and gas exploration and leasing with no stipulations for desert bighorn sheep conservation.

EA UT-069-97-029, at 20-21. The EA then described how, after a visitor reported a sighting of a group of desert Bighorn sheep in Lockhart Basin in 1989, subsequent aerial surveys by UDWR confirmed the existence of a small, but growing, healthy bighorn herd. As the EA noted "[t]his was a very important finding, because these bighorn had survived the disease outbreak" and could help repopulate adjacent areas, particularly if the Lockhart Basin herd had some resistance to the disease which had decimated the desert bighorn sheep in adjacent areas. Id. at 21.

The EA explained that recent radio telemetry and aerial surveys had indicated a herd size of between 75 to 100 sheep, a sufficient number to make the herd viable under present scientific estimates. Of equal importance, a permanent spring near the base of the cliff had been identified as being the key permanent water source used by the Lockhart Basin herd. Indeed, the EA stated that this spring "has been determined by the UDWR and BLM, to be essential to the long term survival of the Lockhart Basin bighorn, especially during dry and drought periods." Id. This spring was located 3,000 feet east of the proposed well pad's revised location. As

the EA had earlier noted, the well pad could not be moved any further to the west without requiring directional drilling by Legacy. Id. at 17. ^{3/}

Moreover, the EA noted that the adjacent talus slope contained "critical spatial and/or escape terrain, rutting, lambing, migration and foraging habitat for the desert bighorn sheep." Id. at 22. This talus slope was particularly heavily utilized during the rutting and lambing periods (October 15 through December 31, and April 1 through July 15, respectively). The proposed drilling pad would be located approximately 1,000 feet southwest of the toe of the talus slope. Id.

In discussing anticipated impacts of the Legacy proposal, the EA noted:

Site preparation and drilling operations taking place during the critical lambing and rutting periods (April 1 through July 15 and October 15 through December 31, respectively) would interfere with bighorn rutting, lambing, lamb rearing and migration. In addition, animal access to the key spring would be reduced, which would result in risk to the long term survival of the area's desert bighorn sheep herd.

Research has documented the importance of space as a critical habitat requirement for desert bighorn sheep. When bighorn are forced to move to other sources of water then increased animal densities around these water sources could occur. Catastrophic die-offs have occurred in Utah, New Mexico, Arizona, California and throughout desert bighorn sheep range as a result of disease transmission when populations have become concentrated or exceeded carrying capacities. Scabies, blue tongue, sinusitis, and other diseases have caused these die-offs, but usually only after population levels have exceeded a critical threshold. It is also important to mention that populations which fall below "viable population numbers" are at risk of disappearing from their range within 50 to 70 years.

* * * * *

[K]ey water sources are crucial to the continued existence of bighorn populations throughout the dry months (April 1 through August 31 in the Lockhart Basin area), especially during drought

^{3/} The EA had also noted that the well site had already been moved 360 feet southeast of Legacy's original proposal in order to avoid excessive cut and fill requirements and to maximize the distance from the talus slope used by the desert bighorn sheep. Id.

years. In non-drought years desert bighorn sheep may not be as dependent upon perennial water sources if free water is temporarily captured at other locations [4/], allowing animals to range greater than 2 miles from key perennial water sources. If the proposed well is drilled during a year of low precipitation, and free water has not been temporarily captured at other locations, the dependency of bighorn on the key spring for water is amplified. The opposite effect would be realized during a year of above normal precipitation, resulting in the temporary capture of free water accessible for bighorn consumption.

[F]lat areas within 0.385 miles of talus slopes and areas within 0.75 miles of permanent water sources are [considered] critical habitat for desert bighorn sheep. Studies of desert bighorn sheep within the Greater Canyonlands/Arches National Park area have found that lactating ewes require a continuous source of water within 0.6 miles of lambing areas. Studies of desert bighorn sheep in Canyonlands National Park found that 94% of observations for all ewe groups were within 0.75 miles of permanent water sources during dry periods. The site preparation and drilling operation could interfere with desert bighorn sheep trailing along the talus slope to access water at the key spring.

If bighorn access to the key spring is denied for a period of a few days (3 days or more) during the rutting and lambing seasons or during a dry period, then long term impacts to the Lockhart Basin desert bighorn sheep population would occur. These impacts would range from abandonment of habitat to increased bighorn mortality, without limitation as to age or sex group. If dominant or alpha rams are prematurely lost to the population, then the genetic integrity of the affected segment of the population would suffer long term decline. The genes of these animals would not be passed on to succeeding generations.

Id. at 25-27 (citations omitted; emphasis supplied).

The EA also noted that single animal or group wariness to human contact would increase if the well proved productive. However, the EA noted that studies had also indicated that desert bighorn sheep can habituate to a variety of human influences and intrusions, so long as the activity is predictable and nonthreatening in nature. The EA concluded that, provided

4/ The EA had earlier noted that, in 1997, four guzzlers had been developed in the Lockhart Basin to provide supplemental water supplies in nondrought periods. The EA noted, however, that "[t]hese guzzlers are not designed to replace the key spring or reduce its importance to the Lockhart Basin desert bighorn sheep herd." Id. at 22.

that the drilling and site preparation activities did not occur during the critical rutting or lambing periods, allowance of the operation would not jeopardize the Lockhart Basin desert bighorn sheep in either the short or long run. Id. at 29.

Based on its analysis of anticipated impacts, the EA then recommended various mitigating conditions prerequisite to allowance of the Legacy proposal. These generally paralleled those suggested in the original EA. However, this EA also provided:

If the Lockhart Basin area receives well above average precipitation which significantly increases the availability of free water for desert bighorn sheep usage during a particular year, then the well could be drilled after the lambing season (July 15). The allowance of drilling after July 15 would be dependent upon actual "ground truth studies" conducted to assure that desert bighorn sheep water requirements are not compromised by drilling the proposed well during the dry time of the year, or in years of average or low precipitation.

Id. at 32.

On December 12, 1997, the SJRA Manager issued a second Decision Record/Finding of No Significant Impact (DR/FONSI II) approving the APD subject to attached COA's. While the COA's were renumbered, they generally tracked the content of the original COA's approved on August 27, 1997, with two important exceptions. Consistent with the discussion in the EA relating to the possibility of conducting initial site preparation and well drilling operations during periods of above normal precipitation, COA No. B-1 provided, inter alia, that "[t]he BLM Area Manager may grant an exception which would allow these operations to occur between July 16 and September 1, if it is determined the precipitation has provided free water at locations other than the key spring and, the free water sources are sufficient to ensure that bighorn water requirements are met." Second, original COA No. B-10 had simply provided that "[p]rior to installation of production equipment and facilities, the operator shall notify the BLM to schedule an on-site inspection." This provision was significantly expanded in the revised COA's where it appears as COA No. B-6. As revised, this COA provided:

Prior to installation of production equipment and facilities, the operator shall notify the BLM to schedule a pre-work conference. The BLM will determine, at that time, reasonable measures necessary to mitigate the visual impacts to the maximum extent practical. These measures shall include, but are not

limited to, use of natural topography to screen facilities, orientation of specific production equipment, flare pit design and construction, artificial screens, etc.

Thereafter, the APD was approved on December 16, 1997, subject to the revised COA's.

SUWA then filed a second request for SDR. As noted above, by decision dated January 16, 1998, the Deputy State Director affirmed the approval of the APD and rejected SUWA's appeal. See SDR UT 98-3. He noted that there were three main areas of concern upon which SUWA premised its objection and he addressed them seriatim. Initially, the Deputy State Director dealt with SUWA's claims that approval of the APD violated the SJRA's prescriptions for visual resources. The objections by SUWA were premised on the Class II VRM designation of Lockhart Basin in the RMP and SUWA's assertion that allowance of the proposed action did not conform to the RMP. Moreover, SUWA pointed out that the lease contained an express stipulation which mandated protection of the VRM classification.

The Deputy State Director dealt with this challenge in two discrete ways. First of all, he noted that, in fact, the EA did address the impacts of the proposed action on visual resources. While the EA identified changes in texture and color of the landscape that would be evident as a result of drilling and production operations, the Deputy State Director argued that VRM objectives are, in fact, essentially guidelines which did not constitute absolute requirements, and that, when viewed in this context, the actions approved were consistent with the RMP prescriptions. Second, with respect to the lease stipulation, while he admitted that a VRM Class II stipulation had been attached to the lease, he asserted that this had been done inadvertently since the RMP provided that lands in Lockhart Basin were open to lease without protective stipulations. In this regard, he noted that "[i]n December 1997, BLM initiated steps to remove the stipulation from the lease." (SDR UT 98-3, at 2.)

Next, the Deputy State Director responded to SUWA's claims that the proposed action violated management prescriptions found in the RMP and in both the Moab District and the Utah Statewide Desert Bighorn Sheep Management Plans. ^{5/} In response, the Deputy State Director declared:

^{5/} While neither the Moab District nor Utah Statewide Desert Bighorn Sheep Management Plans have been submitted to the Board, we have obtained a copy of the Rangewide Plan for Managing Habitat of Desert Bighorn Sheep on Public Lands (Rangewide Plan). The Rangewide Plan identified the Lockhart Basin area as a Class II area, i.e., a habitat area with remnant herds capable of supporting viable populations in which the express BLM policy was to "enhance" the habitat. See Rangewide Plan at 11, 41.

In all critical respects, the Rangewide Plan supports SUWA's description of the management prescriptions recommended for the Lockhart

As stated in the EA, Federal lease UTU-75058 was issued in 1996 in conformance with the San Juan Resource area RMP. The area containing the lease was not designated for protection of sheep via special lease stipulations. The Desert Bighorn Sheep Management Plan was implemented in 1987, and did not amend the oil and gas leasing categories/stipulations of the RMP. By issuing the lease, BLM accepted the possibility of impacts to bighorn sheep. The EA addresses reasonable alternative well locations that could afford protection to desert bighorn sheep. Additionally, mitigation has been developed to prevent undue and unnecessary degradation.

(SDR UT 98-3, at 2 (emphasis supplied).)

Finally, the Deputy State Director rejected SUWA's assertion that BLM's failure to adequately analyze the environmental consequences of post-drilling development violated the National Environmental Policy Act of 1969. The Deputy State Director relied upon the fact that this was an exploratory well and found that the EA sufficiently analyzed the impacts which production from the Lockhart Federal No. 1 well might be expected to generate. He noted that, under present BLM policy, analysis of the impact of full field development need not occur during exploratory activities. Id.

Subsequent to the receipt of the decision of the Deputy State Director, SUWA filed its appeal and request that the Board stay activities under the approved APD pending resolution of its appeal. Shortly thereafter, the County filed a notice of appeal with BLM, also seeking review of SDR UT 98-3. And soon following that, SUWA's formal appeal from the determination of the SJRA Manager to delete the VRM stipulation was filed with the Associate State Director, and upon his subsequent rejection of this appeal, a separate appeal was filed with the Board.

[1] We will first deal with the appeal filed by the County (IBLA 98-168) since it is most readily disposed of. As is apparent from our recitation of the history of this appeal, the County has been concerned with matters related to this lease for some time. Indeed, it initiated SDR

fn. 5 (continued)

Basin area in the Moab District and Utah State plans. See Rangewide Plan at 17-20. Thus, this document provides, inter alia, that "[c]rucial areas, such as lambing grounds, migration routes, mineral licks, and areas within 1 mile of permanent water sources will receive maximum habitat protection" and that "[i]mpacts to desert bighorn sheep or their habitats will be mitigated to the extent possible on all mineral or fossil fuel exploration and development proposals." Id. at 18, 19.

of the original approval of the APD and DR/FONSI I, arguing that the limitations placed on the Legacy lease were violative of 43 C.F.R. § 3101.1-2. It was primarily as a result of these concerns that approval of the APD was set aside and the matter remanded to the SJRA. The reasons for implementing seasonal restrictions beyond those provided in the regulation were explored at length in the revised EA. Yet, while the record indicates that the County was duly served with a copy of the revised EA and DR/FONSI II, the County never sought SDR of this decision. Rather, it waited until a decision had issued in response to SUWA's request for SDR and filed an appeal from that decision. This is not permissible practice.

The Board has expressly held that challenges to decisions approving APD's are subject to the provisions of 43 C.F.R. § 3165.3(b) which requires a party adversely affected by an order of the authorized officer to seek SDR as a precondition to any subsequent appeal. See Southern Utah Wilderness Alliance, 122 IBLA 283 (1992). Furthermore, we have held that, where a party either files a late petition seeking SDR or fails to seek SDR at all, a subsequent appeal is properly dismissed. See, e.g., Wyoming Wildlife Federation, 123 IBLA 392 (1992); Global Natural Resources Corp., 121 IBLA 286 (1992); Han-San, Inc., 113 IBLA 362 (1990). Finally, we have also held that where an individual or organization is afforded the opportunity to protest actions proposed by BLM but fails to do so, it has no standing to appeal the denial of a protest filed by some other individual or organization. See In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). Applying the foregoing principles to the instant facts, it is clear that the County's purported appeal must be dismissed.

Thus, while the County did, in fact, seek review by the State Director of the original approval of the APD by the SJRA Manager, which review resulted in a setting aside of the original APD and the DR/FONSI I, it did not file a request for SDR after the issuance of the December 12, 1997, DR/FONSI II or the approval of the APD on December 16, 1997. This failure is fatal to its present appeal. If the County desired to relitigate its concerns with the SJRA's actions, it was required to first seek SDR of the decision approving the APD. Having failed to do so, it may not now appeal from a decision of the Deputy State Director addressing issues raised by SUWA in its request for SDR. The County's appeal of the Deputy State Director's decision must be dismissed. 6/

6/ In addition to the failure to properly seek SDR, the appeal by the County might also be subject to dismissal on the ground that, given the fact that the lessee (Legacy) had not objected to the COA's attached to its APD, the County could not independently maintain an appeal as to their imposition since it was not adversely affected thereby. However, in light of our disposition of the County's appeal, we need not further explore this question.

Turning to the SUWA appeals, we note that the one concern represented by both IBLA 98-144 and IBLA 98-207 is visual resource management. We will, therefore, discuss that issue first. ^{7/}

Initially, we would note that while the impact on visual resources which would result from approval of the APD on December 16, 1997, did not vary from that expected when the first APD issued on August 27, 1997, SUWA did not directly raise the issue of the impact of the proposal on VRM objectives in its initial request for SDR. While the Deputy State Director did, in fact, set aside the decision approving the APD, he did so solely on issues relating to the adequacy of the EA's consideration of alternative well sites and production methods and the absence of any justification for imposing limitations on the lessee's surface use greater than that delineated in 43 C.F.R. § 3101.1-2. See SDR UT 97-11, at 3.

In view of the foregoing, we believe the Deputy State Director would have been justified in rejecting SUWA's subsequent attempts to raise the VRM issues on the ground that these matters had been waived in SUWA's original request for SDR. In point of fact, however, the Deputy State Director examined the substance of SUWA's complaints as to visual impacts.

For that reason, we believe it appropriate that we do the same. Cf. United States v. Feezor, 130 IBLA 146, 187-89 (1994).

In essence, SUWA argues that approval of the APD violated both the VRM prescriptions contained in the RMP as well as the express stipulation contained in Legacy's lease. Thus, SUWA notes that Lockhart Basin received a VRM Class II designation in the RMP and that approval of the APD violated this classification on two different bases. First, while in some aspects it was admitted that some adverse visual impacts would occur, the EA failed to adequately explore mitigation of these impacts. Second, in other areas, the EA inadequately explored other impacts on visual resources. See Statement of Reasons (SOR) at 8-12. Thus, as an example of the former situation, SUWA complains that while the EA did refer to the possibility of increased dust levels resulting from road usage during drilling, the EA did not explore possible mitigation of this problem such as requiring watering of the road. As an example of its latter complaint, SUWA asserts

^{7/} At the outset, we note that we have some concern that, while BLM has sent the Board a significant volume of materials, we do not have full and complete copies of a number of the documents involved, including the Draft RMP/Environmental Impact Statement (EIS) (May 1986) and the Draft RMP/Final Environmental Impact Statement (FEIS) (September 1987). We realize, of course, that these documents are quite extensive and involve numerous issues which in no way impact upon our present appeals. We have, therefore, decided to proceed with adjudication of the instant matters under the assumption that BLM has, in fact, submitted all documentation relevant to the issues involved herein.

that the EA failed to consider the visual impacts on scenic air tours and incorrectly assumed that the entire access route to the drill pad will be reclaimed when, in fact, BLM has no authority to require reclamation of that part of the access route which crosses state lands. Id. SUWA also points out that, contrary to the BLM Manual, no contrast rating form was completed.

In response, BLM admits that the Lockhart Basin was, in fact, assigned a VRM Class II status in the inventory of lands. The Bureau argues, however, that, notwithstanding this inventory rating, the RMP determined that the land would be subject to leasing without any stipulations to specifically protect visual resource values and that the APD approved herein was fully consistent with the RMP.

Moreover, BLM emphasizes that, in any event, VRM objectives are ultimately in the nature of guidelines and are not meant to be inflexibly imposed without exception. The Bureau notes that the Draft RMP/EIS had explicitly stated that "by the year 2000, in 271 cases, visual contrast rating scores would exceed the VRM class objectives for that area." (BLM Answer at 10, citing 1986 Draft RMP/EIS at 4-71.) Thus, BLM asserts, the RMP clearly contemplated that management policies would be implemented, consistent with the RMP, which would result in a lowering of the assigned VRM rating for the land in question and which would, therefore, not allow BLM to achieve the VRM objectives for that parcel.

With respect to the impacts involved in the APD herein, BLM admits that no visual rating contrast worksheet was prepared, but discounts the importance of this failure by pointing out that a contrast evaluation was performed by the visual resource specialist and that assessment was considered in the EA. See BLM Answer at 13. The Bureau then quotes from the EA's discussion of the visual impacts both of initial drilling and subsequent development should the drilling be successful and directly challenges SUWA's assertions that it had ignored either delineating impacts which could not be mitigated or attempting to mitigate those which could. Id.

Thus, BLM not only points to revised COA Nos. B-6 and B-7 as evidencing the particular mitigation measures which the SJRA was imposing on the APD, but it also emphasizes that under the "standard operating conditions" which apply to any actions in the SJRA, matters such as trash control and dust abatement would also be subject to regulation. While it admits that the VRM Class II objectives would not be met when viewed from County Road No. 122, BLM points out that the EA had concluded that they would be met from the four primary viewpoints within the Canyonlands National Park. See BLM Answer at 14. In short, BLM argues that it fully complied both with the RMP and with its responsibilities with respect to visual resources.

In our view, there is a certain inconsistency in BLM's arguments. Thus, on the one hand, BLM asserts that the RMP overrode any restrictions

which result from the land's classification as VRM Class II, while, on the other hand, it argues that the VRM objectives are essentially guidelines which need not be met in every circumstance. This latter contention, however, is clearly undercut by BLM's actions in removing the special stipulation relating to VRM Class II objectives from lease UTU-75058 on the ground that it is inconsistent with the RMP's direction that the land be open to leasing without any restrictive stipulations.

[2] Initially, we note that, while an analysis of the RMP tends to support BLM's assertion that the oil and gas prescriptions were intended to override the inventory classification of the land as VRM Class II, it is difficult to reconcile this approach with the BLM Manual. 8/ Thus, the BLM Manual provides that "[v]isual management objectives (classes) are developed through the RMP process for all Bureau lands. The approved VRM objectives shall result from, and conform with, the resource allocation decisions made in the RMP's." BLM Manual 8400.0-6A.2 (emphasis supplied).

It seems clear from the foregoing that what the Manual intends is for the resource allocation decisions to determine the VRM classification. It is not contemplated that the RMP resource allocation systems will contravene the VRM classification found in the RMP as BLM apparently contends herein.

In other words, if SJRA made the policy decision to allow leasing without any protective stipulations in the Lockhart Basin, it should have expressly altered the VRM classification to the level which would be consistent with that determination.

This is clearly what the BLM Manual intends. For example, the Visual Resource Inventory Handbook (BLM Manual Handbook 8410-1) provides:

The visual resource inventory process provides BLM managers with a means for determining visual values. The inventory consists of a scenic quality evaluation, sensitivity level analysis, and a delineation of distance zones. Based on these three factors, BLM-administered lands are placed into one of four visual classes. These inventory classes represent the relative value

8/ Moreover, while we do not find this issue to be dispositive, we also believe that the failure to complete a contrast ratings worksheet is difficult to justify. First, we note that, given the presumed VRM Class II rating, use of the contrast rating system was clearly required. See BLM Manual 8431.14L. And, while BLM asserts that its expert used the contrast ratings system but simply failed to complete the form, the BLM Manual Handbook provides that an individual completes the contrast rating "from key observation point(s) using Bureau Form 8400-4 - Visual Contrast Rating Worksheet." (BLM Manual Handbook 8431-1, at 2.) Clearly, the BLM Manual considers completion of the visual contrast rating worksheet to be an integral part of implementation of the contrast rating system.

of the visual resources. Classes I and II being the most valued, Class III representing a moderate value, and Class IV being of least value. The inventory classes provide the basis for considering visual values in the resource management planning (RMP) process. Visual resource management classes are established through the RMP process for all BLM-administered lands (see also Manual 1624.3). During the RMP process, the class boundaries are adjusted as necessary to reflect the resource allocation decisions made in RMP's. Visual management objectives are established for each class. (See Section VB.)

(BLM Manual Handbook 8410-1, at 1.) Once the visual resource management classes are established, however, they are more than merely guidelines. Rather, having been developed through the RMP process, meeting the objectives of each of the respective visual resource classes is as much a part of the RMP mandate as any other aspect of the resource allocation decisions made in the RMP.

A review of the Draft RMP/EIS clearly shows that, rather than alter the visual resource inventory ratings to reflect visual resource management decisions, the RMP simply promulgated the inventory ratings as if they were management ratings. Thus, the Draft RMP/EIS provided:

Inventory work in the SJRA under the VRM system was begun in 1978 and completed in 1984. All three resource allocations have been mapped on 1 inch to the mile maps at the MDO [Moab District Office]. VRM classes are shown in figure 3-18. Acreages are shown in table 3-18.

(Draft RMP/EIS at 3-81.) Table 3-18 clearly delineated the Lockhart Basin as a VRM Class II. But while this table was labelled "Visual Resource Management Classes," what it actually represented was the "inventory" rating not the ultimate "management" rating.

If it were assumed, as the Draft RMP/EIS explicitly stated, that under the RMP resource allocation decisions the "visual contrast rating scores would exceed the VRM class objectives" for a number of areas, the proper response would have been to delineate those areas and expressly lower the VRM inventory rating to reflect the RMP's resource allocation decisions in those areas. More particularly, where acreage which had been inventoried as VRM Class II was thereafter determined to be best suited to leasing without any restrictive stipulations and BLM realized that a result of this resource allocation decision would be an inability to manage that acreage as required under VRM Class II, the VRM classification should have expressly been adjusted to at least VRM Class III. This was not done.

Instead, the RMP noted that the visual resource management classes "have been identified based on inventory work in the SJRA." See RMP at 80. It is clear that, in preparing the RMP, rather than identify areas where

the existing inventory visual resource classes could not be maintained under the selected resource allocation decisions, SJRA simply repromulgated the inventory classes as if they represented the management determinations when, in fact, they did not. ^{9/}

It is because of the failure of SJRA to differentiate between inventory and management visual resource classes in preparing the RMP that it has been forced to take the position in the instant appeal that VRM class objectives are something that can be contravened under the RMP. This is also not correct.

VRM objectives properly designated in the RMP process are as binding on the SJRA as are any of the other resource allocation decisions made in the RMP. Thus, for example, VRM Class II objectives provide:

The objective of this class is to retain the existing character of the landscape. The level of change to the characteristic landscape should be low. Management activities may be seen, but should not attract the attention of the casual observer. Any changes must repeat the basic elements of form, line, color, and texture found in the predominant natural features of the characteristic landscape.

(H-8410-1, at 6.) Obviously, the Class II objectives allow for some minimal level of impact to be apparent from management activities. But, where that level of impact which may result from management activities can no longer be said to be "low," where it "attracts the attention of the casual observer," such discretionary management activities are prohibited until the RMP VRM classification can be changed.

Of course, where the activities which impact upon the visual resources are not "discretionary," as, for example, in the case of valid existing rights, these impacts must be allowed after due efforts, consistent with those valid existing rights, are made to minimize the adverse impacts. But the RMP does not contemplate that such valid existing rights will be

^{9/} That this was an improper use of the inventory process is made clear from the BLM Manual Handbook for Visual Resource Inventory. Thus, it notes:

"Inventory classes are informational in nature and provide the basis for considering visual values in the RMP process. They do not establish management direction and should not be used as a basis for constraining or limiting surface disturbing activities. * * * The assignment of visual management classes is ultimately based on the management decisions made in RMP's."

(H-8410-1, at 6.)

created, after the adoption of the RMP, by the issuance of oil and gas leases since the very act of lease issuance is, itself, discretionary.

[3] The problem which this case thus presents is that the RMP, as adopted by the SJRA, embraces two inherently contradictory positions. First, in its resource allocation decisions, it clearly intends to allow oil and gas leasing in certain areas, including the Lockhart Basin, even if these activities result in adversely affecting the existing visual resources. On the other hand, by essentially adopting the visual resource inventory results as its management prescriptions, SJRA has, in effect, committed to maintaining the status quo so far as visual resources are concerned. As the instant case shows, these two positions can be mutually exclusive.

We believe that the proper way to resolve this conflict is to give force and effect to those management resource allocation decisions clearly made in the RMP. While its visual resource analysis is, as noted above, fairly muddled, the RMP's desire to permit oil and gas leasing in the Lockhart Basin, even if it resulted in degradation of the visual resources, is clear. Indeed, as BLM points out on appeal, SUWA expressly commented on what it perceived as the inadequacy of the protection which would be afforded to Lockhart Basin under Alternative E (the preferred, and ultimately selected, alternative). See Proposed RMP/FEIS at 2-148, to 149.

We believe it altogether consistent with both the clear intent of the RMP, as well as the understanding of those who provided comments thereto, to enforce the resource allocation decisions even where they conflict with the visual resource determinations. Accordingly, we hereby reject SUWA's challenge to the approval of the APD on the ground that it violated the VRM classification for the subject lands. Moreover, to the extent that SUWA argues that the EA failed to adequately consider either the impacts upon visual resources or possible means of mitigating such impacts, our review of the record fails to sustain its allegations. Rather, we find that BLM not only fully considered the relevant impacts but also attempted to mitigate, to the extent possible given the RMP's resource allocation determination, the impacts that might result to visual resource values.

The foregoing discussion, however, brings the issues involved in IBLA 98-207 into sharper focus. While, under our above analysis, the RMP would not require that Legacy adhere to VRM Class II objectives, the inclusion of a stipulation into its lease could independently require the same result. Legacy and BLM both assert that inclusion of this stipulation was an inadvertent mistake which they mutually desire to rectify, while SUWA contends that the stipulation was required by the RMP. Compare BLM's Answer at 16-19 with SUWA's Supplemental Memorandum at 2. Clearly, in light of our above analysis, SUWA's argument cannot be sustained. With respect to the position espoused by Legacy and BLM, we note that, while situations might occur in which BLM and a prospective oil and gas lessee jointly agree to the application of a stipulation to a lease which is more

stringent than that which is otherwise required, there is no indication in the record that such is the case herein. Accordingly, we will affirm BLM's decision removing the VRM Class II stipulation from lease UTU-75058. 10/

The next issue to be decided, i.e., the allowability of the APD in view of its possible impact on desert bighorn sheep, is, in many ways, the most problematic. Unlike the situation with respect to visual resources, the problem here is not one of a failure of the original RMP process. Given the facts then assumed to exist, namely that the Lockhart Basin desert bighorn sheep herd had been wiped out by disease, the failure of the RMP to provide protection for desert bighorn sheep in the Lockhart Basin was altogether understandable. What is more difficult to comprehend is the subsequent failure to amend the RMP to affirmatively provide the protection mandated for the herd by the Rangewide Plan for Managing Habitat of Desert Bighorn Sheep on Public Lands (Rangewide Plan), after information had been obtained showing that the Lockhart Basin herd had, in fact, survived. See note 4, supra.

[4] The argument proffered by BLM on appeal that neither the Moab District nor the Statewide Desert Bighorn Sheep Management Plans amended the RMP ultimately begs the question of why action was not undertaken by the SJRA to formally amend the RMP once it became obvious that the RMP management prescriptions failed to accurately reflect the presence of bighorn sheep in Lockhart Basin. This is either a failure of communication (between the individuals responsible for wildlife and those responsible for oil and gas leasing or, alternatively, between the SJRA and the Utah State Office) or a failure of management.

An RMP is not to be viewed as some static document which, once adopted, remains fixed for all time. On the contrary, for an RMP to have any ultimate vitality, it must be seen as a management tool which is necessarily circumscribed by the values and knowledge existing at the time of its formulation. Certainly, there is a reasonable expectation that, considering the amount of effort and analysis which goes into its development, an RMP would normally be expected to remain in place for at least some duration. But, as is true in virtually all areas of public land management, situations can also be expected to arise in which an RMP no longer accurately reflects the factual knowledge available to BLM decisionmakers on a matter ultimately critical to the resource allocation decisions

10/ This does not, of course, mean that it is improper for BLM to endeavor to minimize visual impacts beyond that required by a VRM classification below level II. On the contrary, as the Manual itself notes, "[s]ince the overall VRM goal is to minimize visual impacts, mitigating measures should be prepared for all adverse contrasts that can be reduced" and this includes "reduction of contrast in projects which have met the VRM objectives." (BLM Manual Handbook, Visual Resource Contrast Rating, 8431-1, at 6.)

implicit in the RMP. When such a situation arises, it becomes the obligation of the appropriate BLM officials to initiate actions leading to the revision or amendment of the RMP. And this is true regardless whether the knowledge becomes available 10 years or 10 months after the RMP is adopted.

The consequences which can result from a failure to so act are manifest in the case before us. Thus, we have a situation in which the revised EA, prepared in 1997, clearly demonstrates the importance of the Lockhart Basin herd. Yet, only 2 years earlier, in 1995, BLM issued an oil and gas lease to Legacy which contained no protection for bighorn sheep beyond that which BLM might impose to prevent unnecessary and undue degradation. While SJRA has, indeed, attempted to mitigate impacts on the herd, it has admittedly not fully enforced the limitations prescribed in the Rangewide Plan since these limitations would either make drilling impossible or prohibitively expensive. 11/ Before this Board, BLM justifies its actions by arguing that it is merely recognizing valid existing rights held by Legacy as it is required to do.

It is true, of course, that all management plans routinely recognize that the management prescriptions being devised can only be implemented "subject to valid existing rights." But, it is almost restating the obvious to observe that the "valid existing rights" to which these management plans refer are rights existing at the time the management plans are adopted. In other words, it is not expected that BLM officials will authorize the creation of future rights whose exercise would be inimical to the very values which a management plan seeks to foster. 12/

Herein, once BLM was apprised of the survival of the Lockhart Basin desert bighorn sheep herd it should have, at a minimum, immediately suspended the issuance of oil and gas leases in the basin. Instead, BLM proceeded to issue such leases, without any restrictions aimed at protecting the herd. While BLM now asserts that it was required to do so by the RMP, this is simply not true.

11/ For example, the Rangewide Plan provides that "[c]rucial areas, such as lambing grounds * * * and areas within 1 mile of permanent water sources, will receive maximum habitat protection." (Rangewide Plan at 18.)

Yet, if BLM were to attempt to enforce this on lease UTU-75058, it would either require that the drill pad be located off-lease or at such a distance away from the target formation that directional drilling would be required at a prohibitive cost.

12/ Admittedly, in certain areas, such as the mining laws, future valid existing rights can come into being without any action by BLM. Such, however, is not the case with rights obtained under the Mineral Leasing Act of 1920 since, until such time as an oil and gas lease issues, one generally does not acquire any rights enforceable against the United States.

Until such time as a lease actually issues, BLM always reserves the right not to lease at all. See, e.g., Harris-Headrick, 95 IBLA 124 (1987).

Nothing in the adoption of the RMP diminished this discretionary authority. The most that the RMP can be seen as requiring is that if BLM chose to lease it could do so without restrictive stipulations. The adoption of the RMP did not, however, constitute a determination that BLM would automatically issue an oil and gas lease should any applicant so desire. Thus, BLM was not compelled to issue a lease to Legacy. Rather, BLM chose to do so in this case, just as the Grand Resource Area Office (GRA) chose not to permit issuance of a lease for adjacent lands in sec. 5 because of its concerns that the GRA RMP had become outdated because of its treatment of desert bighorn sheep. ^{13/} See Letter dated May 1, 1997, from Legacy Energy Corporation to Assistant District Manager, Moab District Office.

We think that, under the facts of this case, there is little question that, had issuance of the lease to Legacy been challenged on the ground that inadequate protection was afforded the desert bighorn sheep herd, this Board, at least, would have sustained the challenge. However, no such protest was filed or pursued and Legacy obtained its lease without any stipulations for the protection of bighorn sheep attached to it.

There is no indication in the record that Legacy was ever other than forthcoming in its dealings with BLM and it seems likely that Legacy acquired lease UTU-75058 in relative ignorance of the problems described above. Thus, notwithstanding the various serious deficiencies apparent in BLM's actions with respect to the Lockhart Basin desert bighorn sheep herd, we must conclude that Legacy has acquired valid rights under lease UTU-75058 which must be recognized.

It also seems clear that SJRA has recognized, albeit somewhat belatedly, the problems with respect to the existing RMP's treatment of the desert bighorn sheep herd in Lockhart Basin since it has now initiated the process of amending its RMP. See SUWA's SOR, Ex. E (Letter dated Jan. 28, 1998, from Moab District Manager to SUWA). While this course of action could be expected to obviate future problems, it is still necessary to deal with the problems attendant to the present appeal.

Regardless of our views as to how BLM should have handled Legacy's original application to lease, the fact is that it granted Legacy a lease which had no special stipulations for the protection of the desert bighorn sheep. In doing so, while the State Office may have acted in technical

^{13/} We note that the boundary of the San Juan and Grand Resource Areas is the canyon rim which runs through sec. 5. Thus, areas west and below the rim are in the SJRA while the areas to the east and above the rim are in the GRA. One of the consequences of the issuance of the lease by SJRA and the refusal to issue a lease by GRA is that Legacy is being forced to drill a well with open acreage almost immediately adjacent to its well-site.

compliance with the RMP, the result was a considerable erosion in the protection which the Rangewide Plan intended to provide for the Lockhart Basin herd. To a large extent, BLM has, with Legacy's concurrence, attempted to mitigate adverse impacts on the herd to the maximum extent possible, given the exigencies of Legacy's drilling program. Our own analysis convinces us that these restrictions, if observed, would likely result in minimal, if any, impacts on the Lockhart Basin herd, at least during the initial drilling program. And, we expect that the monitoring of any impacts will be a matter of some priority in the SJRA.

Given the legal framework in which this appeal has arisen, we are constrained to recognize that the approved APD, with the COA's designed to ameliorate the impacts that drilling might be expected to cause, probably represents the fairest and most desirable outcome now obtainable. The challenges which SUWA mounts on this issue are, therefore, rejected.

[5] Finally, SUWA argues that an EIS is needed because of the substantial impacts that drilling of a well and any ultimate production therefrom will have on both the visual resources of the area and the Lockhart Basin desert bighorn sheep herd. We have noted many times in the past that a FONSI determination that no EIS is required for a specific project will be affirmed on appeal where the record establishes that BLM has taken a hard look at relevant areas of environmental concern and has concluded that, taking into consideration measures designed to minimize environmental impacts, no significant impact on the human environment will result. See, e.g., Southern Utah Wilderness Alliance, 141 IBLA 85 (1997); Southwest Resource Council, 96 IBLA 105, 94 I.D. 56 (1987). In our view, when the proposed action is viewed in the context of the special restrictions imposed by BLM, it seems reasonably clear that the proposed action will not significantly impact upon the human environment and, therefore, an EIS is not needed. Appellant SUWA may disagree with BLM's conclusions with respect to some of the measures which it has directed be taken, but simple disagreement is insufficient to show error in BLM's determination.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions in IBLA 98-144 and IBLA 98-207 are affirmed, the appeal in IBLA 98-168 is dismissed, and the petitions for stay in IBLA 98-144 and IBLA 98-207 are denied as moot.

James L. Burski
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge